THE ROLE OF THE MULTILATERAL INVESTMENT FUND (MIF) IN THE PROMOTION OF FOREIGN PRIVATE INVESTMENTS IN THE LATIN AMERICAN AND CARIBBEAN REGION

*Francesco Seatzu**

Abstract: Of all the forces driving the Latin American and Caribbean economies today, globalization is certainly the most prominent and visible one, and the Multilateral Investment Fund ("MIF") puts itself at the very core of the globalization process in Latin American and Caribbean (LAC) countries. Perhaps no other regional financial institutions in the Latin American and Caribbean region stands so clearly at the dividing line between the so-called 'developed world' and the so-called 'developing world', between the private sector and the public sector, between financial, economic, and environmental realities on the one hand, and government policy aims on the other. The MIF is thus in a unique position to take the lead, thanks to its statutory mission and pragmatic approach to such issues as the promotion of financially sound and profitable projects for marginalized rural communities, and the providing of advisory services to business associations, non-governmental organizations (NGOs), foundations, public sector agencies and financial institutions and, in some circumstances, private sector companies. Moreover, all these issues are at the busy crossroads of the globalization process in the Latin American and Caribbean region, where the MIF is already a key player as it has always operated via partnership arrangements with other international financial organizations of the Inter-American Development Bank Group. This paper will deal the subject from an international legal perspective, beginning with some preliminary remarks on the role of foreign private investments in the economic development of the Latin American and Caribbean (LAC) countries. It will then explore the role of the MIF in supplying low-income populations of the American and Caribbean region with the instruments to promote their incomes and livelihoods through better access to markets and

* Chair in International and EU Law, University of Cagliari, Italy.

the skills to compete in those markets, access to fundamental services, including green technology, and access to microfinance.

KEYWORDS: The Multilateral Investment Fund I ("MIF I"); the Multilateral Investment Fund II ("MIF II"); MIF investment projects; the Latin American and Caribbean region; Latin American and Caribbean ("LAC") countries; micro and small enterprises; economic growth and poverty reduction; gender equality; environmentally sound and sustainable economic development; project finance; donors; the Donors Committee; NGOs; microfinance; technical assistance; the Inter-American Development Bank's Group; the Caribbean Development Bank (the "CDB"); multilateral development banks.

I. INTRODUCTION

Today few would deny that foreign private investments, like workers' remittances, constitute fundamental instruments for strengthening and expanding the economies of developing countries in Africa, Asia and notably in the Latin American and Caribbean region.[1] Although some still declare uncertainty, in particular defendants of the idea that the risk of investing in developing countries is high especially when foreign private investments are linked to privatization programs[2], the trend is clearly in favor of opening borders to foreign private investments as shown by the increased activity in Mexico, Colombia and Brazil.[3] This trend is also shown by the conclusion of the Central American Free Trade Agreement (CAFTA) by the United States, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic.[4]

---

1. FOREIGN DIRECT INVESTMENT IN LATIN AMERICA AND THE CARIBBEAN 2 (2008), *available at* http://www.cepal.org/publicaciones/xml/4/36094/LCG2406i.pdf; *see also* Latin America Copes with Volatility, The Dark Side of Globalization, 42 WORLD BANK LAC (Apr. 2012), http://siteresources.worldbank.org/LACEXT/Resources/Spring_Meetings_Report__English_April162012_Web.pdf (last visited Oct. 11, 2014).

2. RICARDO HASUSMANN & HELMUT REISEN, PROMOTING SAVINGS IN LATIN AMERICA 17-18 (OECD Publications 1997); *see also* ENRIQUE V. IGLESIAS, REFLECTIONS ON ECONOMIC DEVELOPMENT: TOWARD A NEW LATIN AMERICAN CONSENSUS 124 (Inter-American Development Bank, 1992).

3. JASON STANLEY, FINANCING MATTERS: WHERE FUNDING ARRANGEMENTS MEET RESETTLEMENT IN THREE MEXICAN DAM PROJECTS 6 (Univ. of Oxford, October 2003); LUIS ALBERTO MORENO, LA DECADA DE AMERICA LATINA Y EL CARIBE: UNA OPPORTUNIDAD REAL 23 (Banco Interamericano de Desarrollo, 2nd ed., 2011).

4. CAFTA-DR (Dominican Republic-Central America FTA), OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta (last visited Oct. 11, 2014).

Recently, Haiti's earthquake in January 2010, and the economic crisis in the Dominican Republic have certainly increased this trend.[5] During the last few years the MIF has supported the people of Haitian and Dominican Republic through projects promoting sustainable economic growth and job creation.[6] Over fifty organizations that range from micro enterprises, to agricultural cooperatives, to small businesses in Haiti,[7] and the Dominican Republic,[8] have profited from the contributions and incentives. These incentives come in the form of access to finance, markets, and skills – including technical assistance – and green growth, and essential services.[9]

The liberalization and the admission of foreign direct investments in the private sector have been impressive, although this was unthinkable only a few years ago. For the first time in their history several Latin American and Caribbean countries such as Brazil, Venezuela and Colombia, are attracting private direct investments. According to a report delivered in 2012, this private direct investments are mostly in the form of private equity investments, from institutions based overseas, lured by a mixture of favorable regulatory changes, demographic shifts, and strong economic fundamentals.[10]

Although insufficient, the newly liberal trend and the significant improvement in most Latin American and Carabbean countries' private foreign investment climate are praiseworthy, elements to enhance foreign direct investments in the private sector. The absence of stability and the fragility of many of the democratic governments in the Latin American and

---

5. *See* IDB's Actions after the Earthquake in Haiti, INTER-AMERICAN DEVELOPMENT BANK, http://www.iadb.org/en/countries/haiti/idb-actions-after-the-earthquake-in-haiti,1224.html (last visited Oct. 11, 2014).

6. Fernando Prada, *World Bank, Inter-American Development Bank, and Subregional Development Banks in Latin America: Dynamics of Multilateral Development Banks*, ASIAN DEVELOPMENT BANK INSTITUTE *available at* http://www.adbi.org/files/2012.09.05.wp380.dynamics.system.multilateral.dev.banks.pdf (last visited Oct. 17, 2014).

7. *See IDB's Multilateral Investment Fund Assumes Responsibility for Clinton Bush Haiti Fund Portfolio*, INTER-AMERICAN DEVELOPMENT BANK (Dec. 20, 2012), http://www.iadb.org/en/news/news-releases/2012-12-20/mif-takes-over-clinton-bush-haiti-funds-portfolio,10279.html (last visited Oct. 11, 2014).

8. Paul Christian, *Impact of the Economic Crisis and Increase in Food Prices on Child Mortality: Exploring Nutritional Pathways*, J. OF NUTRITION (Jan. 2010), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2793127/#fn1 (last visited Oct. 12, 2014).

9. *IDB's Multilateral Investment Fund*, *supra* note 7.

10. MORENO, *supra* note 3, at 142.

Caribbean region remain in the mind of future investors.[11] Clearly, all these factors have given rise to the perception of the so-called political risks, which include civil disturbance, war, expropriation, breach of contract, currency inconvertibility, and denial of justice, over which investors had no influence. Moreover, investors still fight against these perceptions. The prospect of these risks materializing in the short to medium term simply may not be estimated or determined. These circumstances indeed constitute a serious deterrent for companies based overseas investing in developing countries in the Latin American and Caribbean region. As for medium and long-term investments, these are the kinds of transactions that contribute the most to the enhancement of the economies of the recipient countries. It is significant that countries willing to lure foreign investments in the private sector supply future investors with appropriate tools to minimize or eradicate the negative impact that political risk can have in the minds of those target investors.[12]

More significantly, prospective investors are not the only ones concerned about political risks. Commercial banks, which finance investments in developing countries, can be satisfied with commercial feasibility studies prepared by the investors. Nevertheless, the uncertainties regarding political risks can jeopardize their participation in an investment project.[13] In several developed countries the regulations of its central banks instruct commercial banks to confer a percentage of the volume of the financing to country risk. Occasionally, the duty to respect this rule makes financing exorbitant. When that happens the investor simply cannot go ahead with the project.

Investors may diminish their political risk through insurance.[14] However, very few private insurance organizations are willing to cover these risks. Coverage for more than three years is unfeasible from such sources. For instance, war risk is not covered at all and interchange is accepted in these private markets only in very special cases.[15] The rationale behind this situation is that actuarial calculations cannot be applied to medium and long-

---

11. GERT ROSENTHAL, DEVELOPMENT THINKING AND POLICIES IN LATIN AMERICA AND THE CARIBBEAN: PAST AND FUTURE, ECONOMIC AND SOCIAL DEVELOPMENT INTO THE XXI CENTURY 191-192 (Inter-American Development Bank, 1997).

12. AUGUSTO DE LA TORRE Y ALAIN IZE, EL PAPEL CREDITICIO DE LA BANCA DE DESARROLLO EN LA POST-CRISIS [THE CREDIT ROLE OF DEVELOPMENT BANKS IN THE POST-CRISIS ERA] 3 (Oficina Regional del Economista Jefe America Latina y el Caribe Banco Mundial, 2010).

13. Kenneth W. Hansen, *Managing Political Risks in Emerging Market Investment*, 77 *available at* HeinOnline, 18 TRANSNAT'L L. 77 (2004-2005).

14. Donald R. O'May, *War Risks*, 36 LLOYD'S MAR. & COM. L.Q. 180 (1976).

15. Annemarie Sedore, *War Risk Exclusion in the 21st Century: Applying War Risk Exclusions to the Attacks of September 11th*, 82 B.U. L. REV. 1041, 1043 (Oct. 2002).

term coverage of political risks.[16] Thus, industrialized countries that want to encourage their national enterprises to invest abroad have made investment insurance schemes with Treasury backing that supply medium and long-term coverage against all kind of non economic risks. With very few exceptions, these schemes are part of national export credit insurance programs. Obviously the aim of these official insurance institutions is to support and defend their nationals. Nevertheless, they indirectly support the developmental attempts of the host countries.

The first step toward a regional multilateral scheme was a reasonable solution to some of the defeats suffered by the official and private insurance companies. This first step might have directly helped the developmental aims of countries by supplying insurance coverage against political or commercial risks. Though the concept dates back to the 1950s, it did not materialize until 1993, when the agreement establishing The Multilateral Investment Fund (MIF I) came into force.[17] Earlier, in 1985, a universal multilateral system, the World Bank's Multilateral Investment Agency (MIGA), was established.[18] Its purpose was partially similar[19], though not identical to that of the MIF, which is narrower.[20] The MIGA was not geographically limited to the Latin American and Caribbean region.[21]

From an international legal perspective, this article describes the MIF's role in promoting foreign private investments in developing countries of the

---

16. *Id.* at 1042.

17. *The Multilateral Investment Fund*, INTER-AMERICAN DEVELOPMENT BANK (Feb. 14, 2005), http://www.iadb.org/en/news/background-papers/2005-02-14/the-multilateral-investment-fund,2792.html (last visited Oct. 12, 2014).

18. History, MULTILATERAL INVESTMENT GUARANTEE AGENCY WORLD BANK GROUP (2011), http://www.miga.org/whoweare/index.cfm?stid=1787 (The Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) was submitted to the Board of Governors of the International Bank for Reconstruction and Development on October 11, 1985, and went into effect on April 12, 1988. The Convention was amended by the Council of Governors of MIGA effective November 14, 2010) (last visited Oct. 12, 2014).

19. Overview, MULTILATERAL INVESTMENT GUARANTEE AGENCY WORLD BANK GROUP (2011), http://www.miga.org/whoweare/index.cfm?stid=1786 (The Multilateral Investment Guarantee Agency (MIGA)'s aim is to underwrite private investments in developing countries (on commercial terms) in order to protect them against non-economic risk) (last visited Oct. 12, 2014).

20. Agreement Establishing The Multilateral Investment Fund II art. 1 (1), (Apr. 9, 2005), http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=981899 [hereinafter MIF II] (MIF's development role is clearly mandated in its Articles of Agreement (Agreement Establishing the Multilateral Investment Fund II (the "MIF II Agreement")). Article 1, Section 1 states that "The general purpose of the MIF II is to support economic growth and poverty reduction in the regional developing member countries of the Bank and the developing member countries of the Caribbean Development Bank (the "CDB") by encouraging increased private investment and advancing private sector development") (last visited Oct. 17, 2014).

21. Overview, *supra* note 28.

Latin American and Caribbean region. Moreover, it considers the way in which the Latin American and Caribbean member countries may benfit from the activities of the Fund.[22]

II. THE MIF'S ORGANIZATION AND VOTING STRUCTURE

A brief historical background is useful in order to help the reader better understand the role and functioning of the MIF.[23] The Inter-American Development Bank (hereinafter the "IDB") was established as a result of the Quitandhina Conference of 1954.[24] Several proposals for the establishment of an Inter-American Development Bank were put forward and countries adopted a resolution that called for the convening of a committee.[25] These committees consisted inter alia of the representatives of nine Latin American countries' central banks.[26] Thier purpose was to draft an agreement to present to the Organization of American States (OAS) for the creation of a regional financing organization.[27] The IDB commenced business in 1959.

The IDB and the MIF were structured as indispensable components of the inter-American system.[28] The IDB's initial focus was to guarantee the access of LAC developing countries to capital markets.[29] Its development and social activities started only a few years later when "IDB programs gave overall support to the state-led development model and endorsed social intervention."[30] The IDB Group is currently composed of three institutions: one provides loans, guarantees, and technical assistance for public and private sector projects; another focuses on support for small and medium-

22. History of MIF, MULTILATERAL INVESTMENT FUND MEMBER OF THE IDB GROUP, http://www.fomin.org/about/History-of-MIF (The Multilateral Investment Fund (MIF) describes itself as the largest provider of technical assistance for private sector development in the Latin American and Caribbean (LAC) region) (last visited Oct. 13, 2014).

23. *See* MIF *available at* http://wetten.overheid.nl/BWBV0001828/geldigheidsdatum_30-01-2013.

24. SYDNEY DELL, THE INTER-AMERICAN DEVELOPMENT BANK: A STUDY IN DEVELOPMENT FINANCING 9 (Praeger Publishers, 1972).

25. *Id.*

26. *Id.*

27. *Id.* (Author rightly stresses that the: "[i]dea of a regional development bank (RDB) goes back to the end of the nineteenth century, but it took over sixty years to come to fruition").

28. DIANA TUSSIE, THE INTER-AMERICAN DEVELOPMENT BANK 62 (Lynne Rienner Publishers Inc., vol. 4, 1995).

29. *Id.* at 2.

30. *Id.* at 3.

sized businesses; while a third one promotes private sector growth through grants, and investments with an emphasis on microenterprise.[31]

The MIF was founded in 1993 by the shareholders of the IDB as a separate legal entity, to allow the private sector to play a role in furthering economic development in the LAC developing countries.[32] The MIF invests in the private sector.[33] The other affiliate of the World Bank Group, the Inter-American Investment Corporation (IIC), was founded in 1989 and also has a separate legal status and shareholding[34]. The IIC provides project financing in the form of direct loans and equity investments, lines of credit to local financial intermediaries, and investments in local and regional investment funds.[35] In particular, it targets mid size and small entities that have difficulty achieving financing from different sources on equitable terms.[36]

The MIF's mandate is to enhance sustainable private sector development, and the MIF's Charter authorizes that it accomplish its purpose in conjunction with the IDB.[37] The IDB plays a different role in development. Due to the terms of the establishing agreement, it may only lend directly to governments, government agencies (including state corporations), or to an entity other than the government with a host government guarantee.[38] This government guarantee may support loans by the IDB to a para-statal (a 100 percent government-owned) corporation or to a private project.[39] With the exception of these partial guarantees, the IDB finances government and government-backed projects, while the IFC finances private sector and privately-backed projects.[40]

---

31. *Investor Presentation,* INTER-AMERICAN INVESTMENT CORPORATION (May, 2014), http://cdn.iic.org/sites/default/files/pdf/investor-presentation.pdf (last visited Oct. 12, 2014); *About the Inter-American Development Bank,* INTER-AMERICAN DEVELOPMENT BANK, http://www.iadb.org/en/about-us/about-the-inter-american-development-bank,5995.html (last visited Oct. 14, 2014); History of MIF, *supra* note 31.

32. Carol Mates, *Project Finance in Emerging Markets-The Role of the International Finance Corporation,* 18 TRANSNAT'L. L. 165 (2004-2005).

33. TUSSIE, *supra* note 38, at 145.

34. *Id.* at 143.

35. *Id.* at 33.

36. *Id.* at 32.

37. MIF II, *supra* note 29, at PMBL. ("[t]he Prospective Donors intend for the MIF II to continue to complement the work of the Bank, the Inter-American Investment Corporation (the "IIC") and other multilateral development banks").

38. MIF II, *supra* note 29, at § 2(a)(i).

39. *See* Guarantees, INTER-AMERICAN DEVELOPMENT BANK (2014), http://www.iadb.org/en/about-us/idb-financing/guarantees-,6040.html (last visited Oct. 14, 2014).

40. *Id.*

A quick glance at some provisions of the agreement establishing the Multilateral Investment Fund can give the impression that these issues are considered here as they are in the Articles of Agreement of the World Bank's International Finance Corporation (IFC).[41] Some of these issues are the Fund's organization and operation (Article III, sections 1, 2 and 3),[42] and to its voting structure (Article IV, sections 1, 2, 3 and 4).[43] There is a strong analogy between the corresponding rules of the constituent agreements of these two financial institutions, which is understandable because the institutions exercise very similar functions as their overriding aim is to help reduce poverty and support sustainable development in developing countries.[44] However, a diligent reading of these rules would clearly distinguish the MIF not only from the IFC, but also from other international financial organizations operating in the private sector. The most important difference is of course the requirement of the MIF Agreement that "the Fund shall not be used to finance any undertaking in the territory of a regional developing member country of the Bank if that member objects to such financing."[45] Nevertheless, significant differences persist in other areas as

41. Articles of Agreement of the World Bank's International Finance Corporation (IFC), 25 May 1955, UNTS, 117; *See* Mates, *supra* 32, note 42; Carol F. Lee, "International Finance Corporation: financing environmentally and socially sustainable private investment", in Sabine Schlemmer-Schulte, Ko-Yung Tung (eds), Liber amicorum Ibrahim F.I. Shihata: international finance and development law (2001), 469-481. *See also* Edward Mason, Robert Asher, The World Bank Since Bretton Woods: The Origins, Policies, Operations (1973), 350 ff.

42. MIF or FOMIN as the Fund is known in Spanish. The Multilateral Investment Fund is a special fund administered by the Inter-American Development Bank and is a member of the Inter American Development Bank Group, which also comprises the Inter-American Development Bank (IDB), the Inter-American Investment Corporation (IIC), and the Fund for Special Operations (FSO). As of February 2013, MIF has 39 member countries, of which 13 are industrialized and 26 are developing countries. So far, no additional countries are in the process of completing their membership requirements. The United States is its largest contributor. Membership in the Fund is open to all countries that are members of the IDB, provided that they are not listed on Schedule A.

43. MIF II *supra* note 29, at art. II, art. IV § (1)-(4).

44. MIF II *supra* note 29, at PMBL. (In seeking to deliver development impact, the MIF pursues a fourfold mission: to support companies and other private sector partners to deliver basic services, to generate productive jobs and to create opportunities for people to escape poverty and ameliorate their lives. The MIF uses two types of development intervention: advisory services and financial products).

45. MIF II *supra* note 29, at art. III § 3(d) & (g). ("Financing in the territories of countries which are members of the CDB, but not the Bank, shall be conducted in consultation and agreement with, or through, the CDB and under such conditions, consistent with the principles of this Section, as the Donors Committee shall decide."); *see also* International Finance Corporation Articles of Agreement art. III (1), Dec. 5 1955, 7.2 U.S.T. 2197, 264 U.N.T.S. 117 (entered into force July 20, 1956) ("The Corporation may make investments of its funds in productive private enterprises in the territories of its members. The existence of a government or other public interest in such an enterprise shall not necessarily preclude the Corporation from making an investment therein" (emphasis added)) [hereinafter IFC Agreement].

well. They include the powers of the Board (the so-called 'Donors Committee' in the MIF's Agreement),[46] and the fact that the Donors Committee, unlike the Board of the IFC,[47] will not function in regular session except at such future time as would be suggested by its workload.[48] The rest of this section explains the details of the MIF's structure and management, as well as its peculiar distinctive voting structure. It anticipates some of the problems that could arise in these areas and attempts to find ways in which these problems could be adequately solved.

According to Article IV of the MIF Agreement, its purpose is to provide technical assistance to stimulate innovation and economic growth in Latin American and Caribbean countries.[49] The MIF originated as part of President Bush's 1990 Enterprise for the Americas Initiative (*EAI*) and has two departments, the Donors Committee (the Committee), and the Small Enterprise Investment Fund (the *SEIF*).[50] Acting as the Governing Body of the MIF:

> The Committee shall be responsible for the final approval of all proposals for operations of the Fund and shall seek to maximize the Fund's comparative advantage through operations with high developmental benefits, efficiency, innovation, and impact in accordance with the functions of the Fund as specified in Article I, Section 2.[51]

---

46. IFC Agreement *supra* note 56, at art. III(2).

The Corporation may make investments of its funds in such form or forms as it may deem appropriate in the circumstance with Art. III, section 2 of the MIF Agreement stating that: To carry out its purpose, the Fund shall provide financing in the form of grants, loans, guarantees or any combination thereof, and as provided in paragraph (b) of this Section, also in the form of equity and quasi-equity or any combination thereof; provided, however, that the Fund shall maintain its essential grant-making character at levels commensurate with MIF I historical practice.

47. IFC Agreement, *supra* note 56, at art. IV(2)(d). ("The Board of Governors shall hold an annual meeting and such other meetings as may be provided for by the Board of Governors or called by the Board of Directors").

48. MIF II, *supra* note 29, at art. IV § 3. ("The Donors Committee shall meet at the principal office of the Bank as often as the business of the Fund requires. The Secretary of the Bank (serving as Secretary of the Committee) or any Donor may call a meeting").

49. MIF II, *supra* note 29, at PMBL.

50. *Id.* at art. VI § 1. ("Any country willing to become member of the MIF not only shall sign and ratify the MIF Agreement but must also become a Donor by depositing an Instrument of Acceptance and an Instrument of Contribution in an amount, and on dates and conditions, approved by the Donors Committee").

51. *Id.* at art. IV § 2.

The final provision of Article IV, section 2 clarifies that "the Committee shall consider operations that follow such functions and decline to consider, or phase out, those that do not."[52]

Additional powers of the committee specifically mentioned by the MIF Agreement as include the following: determination of its organization, procedure and rules of operation; and the request of an autonomous assessment by the Bank's Office of Evaluation and Oversight, payable from resources of the MIF, to review MIF outcomes in light of the aim and functions of this MIF Agreement.[53] According to Article IV, section 5, such assessment shall encompass an evaluation of the outcomes of project groups "based on benchmarks and indicators, for aspects such as relevance, effectiveness, efficiency, innovation, sustainability and additionality, and progress with regard to the implementation of recommendations approved by the Donors Committee."[54]

Article III, section 2, subsection b, after briefly reproducing the language of the previous section 1 related to the general operation and functioning of the MIF, states that:

> To . . . achieve the Fund's purpose, a Small Enterprise Investment Fund (the "SEIF") shall be maintained as a fund within the MIF II and shall at all times and in all respects be held, used, obligated, invested and accounted for separately from other resources of the Fund. "While the financial resources of the SEIF "may be used to make loans, guarantees, equity and quasi-equity investments or any combination thereof, directly or through intermediaries, to private sector entities which are creating or expanding services to micro and small enterprises, or which are financing or investing in micro and small enterprises.[55]

The Committee must indicate the basic conditions and terms of such guarantees, loans and investments. Such terms and conditions include the repayment prospects and to the commitment of specific member countries to poverty eradication, the non economic costs of economic reforms, the financial necessities of the future recipients and the relative degrees of poverty in specific member countries.[56] In practice, the SEIF is not likely to

52. *Id.* at art. IV § 2.

53. *Id.* at art. IV § 5.

54. MIF II, *supra* note 29, at art. IV § 5.

55. *Id.* at art. 2(b).

56. *Id.* at art. (2)(c), 3(3)(c); *see also* Nora Lusting and Ruthanne Deutsch, The Inter-American Development Bank and Poverty Reduction: An Overview, INTER-AMERICAN DEVELOPMENT BANK (May 1998), at 18 http://www10.iadb.org/intal/intalcdi/PE/2010/07179en.pdf (last visited Oct. 6, 2014).

operate on any of these issues in the absence of indications from the Committee.[57]

III. THE MIF'S OPERATIONS: POLICY AND LEGAL ISSUES OF THE MIF'S FINANCING OPERATIONS AND SERVICES

Pursuant to Article III, section 2 of the MIF Convention, the MIF shall "provide financing in the form of grants, loans, guarantees or any combination thereof, and eventually in the form of equity and quasi-equity or any combination thereof; provided, however, that the Fund shall maintain its essential grant-making character at levels commensurate with MIF I historical practice."[58] This MIF activity was not meant to be the end result. Instead, it was meant to be one of several functions that together pursue a different aim. In the words of the MIF Agreement, this aim is to support "economic growth and poverty reduction by encouraging increased private investment and advancing private sector development."[59]

The MIF's operations will be governed by several tools. This fundamental framework is, of course, supplied by the MIF Agreement. To prevent the need for regular revisions, the Agreement's provisions are generally drafted in broad terms, but foresee that they will be elaborated upon from time to time in rules and policies to be issued by the Donors Committee.[60] Pursuing the same aim to avoid the need of frequent amendments, Article VI, section 2, subsection a states that "The MIF Agreement may be amended by the Donors Committee, only with a 2/3 majority of the Donors representing not less than three-quarters of the total voting power of the Donors."[61]

In accordance with the Agreement, financing from the Fund shall be provided under the terms and conditions of the MIF Agreement consistent with the rules contained in Articles III, IV, and VI of the Convention establishing the Inter-American Development Bank, and, where appropriate, the policies of the IDB applicable to its own operations.[62]

---

57. MIF II, *supra* note 29, at art. 3(2)(b) ("Any amounts, whether dividends, interest or otherwise, received by the Bank from the operations of the SEIF shall be deposited to the account of the Fund").

58. *Id.*; *How We Work*, MULTILATERAL INVESTMENT FUND MEMBER OF THE IDB GROUP, http://www.fomin.org/About/How-we-work (MIF invesment projects are generally undertaken in partnership with a vast panoply of both private and public entities, which also participate with from 30% to 50% of the entire project cost, depending on the country) (last visited Oct. 6, 2014).

59. MIF II, *supra* note 29, at art. 1(1).

60. *Id.* at art. 4.

61. *Id.* at art. 6(2)(a).

62. *Id.* at art. 3(3)(a).

Article IV, section 2, states that "The Donors Committee shall be responsible for the final approval of all proposals for operations of the Fund . . . "[63] Once the financing has been approved, it will be presumed to be consistent with the Agreement.[64] Before the financing approval stage is reached, nevertheless, the MIF should take a number of steps relating to its decision to underwrite the financing. The process normally begins with the MIF's determination that the proposed financing encounters certain eligibility criteria.[65] For instance, according to Article III, section 3, only "[r]egional developing member countries of the Inter-American Development Bank (the Bank) and the CDB are potentially eligible recipients of financing from the Fund to the extent that they are eligible beneficiaries of financing from the Bank."[66] Moreover, the Donors Committee should only consider financing operations with high developmental benefits, efficiency, innovation, and impact in accordance with the functions of the Fund and decline to consider, or phase out, those that do not follow such functions.[67]

The scope of the MIF's financing operations is defined through these requirements that are indeed central to the MIF's character as an institution. Possibly more distinctly than other aspects of the Fund's financing operations, they translate its wide purpose into practical terms, differentiating it from domestic financing programs, and show the flexibility of the MIF's design. The requirements relate to the financing recipient, as well as to the financing itself.

Some of the requirements directly reflect the MIF's developmental purpose, while others more evidently foster the defence of its financial viability. The two issues are nevertheless interrelated. In keeping with its purpose to boost foreign direct investments in the private sector, for instance, the MIF should be satisfied that the proposed investment is economically sound and contributes to the development of the host country.[68] At the same time, it can be assumed that an investment that has these qualities and therefore serves the host country's interests is likely to be less sensitive to host governmental actions which could give rise to a claim. To qualify for financing, the investment should furthermore conform with the host country's regulations, laws and declared developmental priorities and aims.[69] The host country's approval is moreover required for the issuance of the MIF's

---

63. *Id.* at art. 4(2).
64. MIF II, *supra* note 29, at art. 3(3)(d).
65. MIF II, *supra* note 29, at art. 3(1).
66. *Id.* at art. 3(3)(a).
67. *Id.* at art. 4(2).
68. *Id.* at art. 1(2)(j).
69. *See id.* at art. 1(2)(i).

financing.[70] The eventuality of claims is also diminished by what can be regarded as a general eligibility requirement relating to the host country. The requirement contained in Article III, section 3, subsection c of the MIF Agreement states that before initiating financing operations in a country the MIF should satisfy its own terms as to the financing conditions there, including: "[t]he commitment of specific member countries to poverty reduction, the social costs of economic reforms, the financial needs of the prospective recipients and the relative levels of poverty in specific member countries."[71]

A general requirement relating to eligibility for financing is set out as an exclusion in the Agreement. In accordance with Article III, section 3, subsection e, IMF resources must not be used to finance or pay for project expenses that have been incurred prior to the date the MIF resources become available.[72] Although relevant, this exclusion simply reflects standard financing practices. The unique features of MIF's financing operations will nevertheless be brought into brighter focus when we consider the eligibility requirements in wider detail, beginning with eligible financing proposals, and including eligible recipients of financing.

Sections (1) through (3) of Article III of the MIF Agreement set out certain criteria that will be used in the evaluation of financing proposals.[73] To guarantee flexibility, the MIF Agreement avoids the enumeration of eligible financing options in an exclusive catalogue of the forms or types of financing, because such a catalogue might easily become outdated with the passing of time. Alternatively, the Agreement establishes the general principle that any form of medium or long-term provision of financing for productive purposes is eligible for MIF coverage.[74] Certain types of grants, loans, guarantees or any combination thereof, are considered initially eligible by an explicit provision of the MIF Agreement.[75] However, these are merely priorities or examples, for other forms might always be added by a special decision of the Fund's Donors Committee.[76] Therefore, article III, section 2, subsection a authorizes the MIF from the outset to provide financing "in the form of equity and quasi-equity, or any combination thereof provided,

---

70. MIF II, *supra* note 29, at art. 3(3)(g).

71. MIF II, *supra* note 29, at art. 3(3)(g).

72. *Id.* at art. 3(3)(e).

73. *Id.* at art. 3(1)-(3).

74. *See id.* at art. 3(2)(a)(ii) ("Among other activities, operations may be directed at: supporting activities that increase the ability of the private sector to generate income, create employment opportunities, develop workforce skills, utilize technology, and achieve sustainable growth, with a focus on micro and small enterprises").

75. *Id.* at art. 3(2)(a).

76. *See generally* MIF II, *supra* note 29, at arts. 3(2)(b), 4(4)(a).

however, that the Fund shall maintain its essential grant-making character at levels commensurate with MIF I historical practice."[77] Article IV, section 2 further allows the Fund's Donors Committee to extend eligibility to any other medium or long-term form of financing.[78] Such an extension can occur at any time the Donors Committee deems it appropriate.[79]

It must be recalled that from the outset the MIF had at its disposal the authority to offer a wide range of financing options.[80] Indeed the success of the MIF's financing program depends in large measure on the freedom of action which is consistent with forms of financing actually used in the market place. However, such freedom is not unlimited, Article III Section III, subsection h states that,

> Fund operations shall include specific goals and measurable results. The developmental impact of the Fund's operations shall be measured in accordance with a system that takes into account the purpose and functions of the Fund stated in Article I and subject to best practices to the effect of: (i) outcome indicators, disbursement speed, degree of innovation, ability to disseminate lessons learned, and performance in the execution of projects; (ii) a framework for evaluating projects on an individual and project-group basis, and ex-post evaluations; and (iii) public dissemination of results.[81]

Experience has proven the market has the capability to continuously generate new forms of financing. By escaping a definitive enumeration of eligible forms of financing, the MIF Agreement allows the Fund to adapt itself to such innovations.[82] To complement existing private sector entities, the MIF should also be able to fill gaps in the services they provide to micro

---

77. *Id.* at art. 3(2)(a).

78. *Id.* at art. 4(2).

79. *Id.* at art. 4(2); *see also* IFC Agreement, *supra* note 56, at art. 3(2) Article IV, section 2; *see also* Article III, section 2 of the IFCs Articles of Agreement, which states that "The Corporation may make investments of its funds in such form or forms as it may deem appropriate in the circumstances."

80. *See* MIF II, *supra* note 29, at art. 3(2).

81. *What We Do*, MULTILATERAL INVESTMENT FUND MEMBER OF THE IDB GROUP, http://www.fomin.org/About/What-we-do (last visited Oct. 6, 2014); *see* MIF II, *supra* note 29, at art. 3(3) (According to the MIF's official website, the same rationale is also behind the institution of the so named 'Access Framework' in 2010 which purports to accomplish more centered outcomes and to implement impact assessment and knowledge capturing and sharing instruments as part of its enduring effort to sustain innovative activities and projects).

82. *What We Do*, *supra* note 93. (The MIF is currently in the process of developing a framework with indicators at four levels: Project level, Agenda level, Access Area level and MIF level. In the case of some Topics, there will also be common indicators at the Topic level. Establishing common indicators will allow us, for the first time, to aggregatively assess the direct benefits created by our projects).

and small enterprises. This also underscores the need to develop forms of financing not foreseen in the conditions and terms of national financing programs.

In addition, Article III, Section 3 of the MIF Agreement finally sets out the requirements that financing recipients should meet in order to receive a grant, loan, or a guarantee from the Fund.[83] These requirements relate to the nature and mode of operations of the financing recipient. According to Article III, Section 2, subsection a, "Financing and advisory services may be provided to governments, government agencies, sub-national entities, non-governmental organizations, private sector entities, or others, to support operations that further the Fund's purpose."[84]

IV. THE MIF AND THE LEGAL STANDARDS APPLICABLE TO FINANCING AND ADVISORY SERVICES

The standards for the treatment of financing by the Fund constituted one of the main items regulated by the MIF Agreement.[85] The Preamble of this Agreement is drafted, and therefore should be read, in line with the broad aim of the Fund. According to Article I, section 1, this aim is to "support economic growth and poverty reduction in the regional developing member countries of the Bank and the developing member countries of the Caribbean Development Bank (the "CDB") by encouraging increased private investment and advancing private sector development."[86] With this aim in mind, the Preamble strikes a clear balance between the interests of the financing recipients and the protection required for stimulating a wider flow of grants, loans, guarantees, or other forms of financing. Thus, recognizes unequivocally that the flow of private financing to promote activities which enhance the business environment in the developing member countries of the IDB and the CDB. Also, the flow of private financing would be facilitated and futher encouraged by making grants, loans and guarantees available "[o]n a basis which permits contingent recovery in appropriate cases of funds disbursed."[87] Also, it records the mutual desire of the MIF members "to stimulate micro and small enterprises and other entrepreneurial activities" under two balanced requirements.[88] On the one hand, enhancement of the flow is desired under conditions consistent with "the financial needs of the prospective recipients and the relative levels of poverty in specific member

---

83. *See* MIF II, *supra* note 29, at art. 3(3)(a)-(h).

84. *Id.* at art. 3(2)(a).

85. *Id.* at art. 3(2)(a).

86. *Id.* at art. 1(1).

87. MIF II, *supra* note 29, at art. 3(3)(f).

88. *Id.* at art. 1(2)(c).

countries."[89] On the other hand, the flow will be enhanced "in order to maximize efficiency and developmental impact, with particular emphasis on ex-ante risk assessment."[90] The availabilty of appropriate standards and their "stability" and "efficiency" are therefore recognized from the outset as prerequisites for the implementation of the MIF's mandate of promoting the flow of private financing under conditions consistent with the ambitions of the developing countries of the Latin American and Caribbean region.

Article III, section 2 of the MIF Agreement provides that:

> In guaranteeing a financing, the Fund shall satisfy itself as to the environmental and economic soundness of the financing and their contribution to the promotion of efficient, transparent and responsible market practices; the ability of the financing to generate income, create employment opportunities, develop workforce skills, utilize technology, and achieve sustainable growth, with a focus on micro and small enterprises.[91]

As it stands Article III, Section 2 requires that the Fund should be satisfied if two types of conditions have been met before it finances any activity in the private sector. The first type relates to the concrete activity to be sponsored, and the second to the financing conditions in the host country.[92]

In addition to the other eligibility conditions indicated in Section 3 of this Article, an activity to be supported must, in the judgment of the Fund, satisfy four other conditions.[93] First, it has to be a sound investment.[94] This is a requirement which, according to what has been explicitly indicated in the MIF Agreement, is meant to serve the Fund's purpose without undermining its financial feasibiliy.[95] In addition, it requires a general review by the Fund of the financial, economic and technical feasibility of each financing.[96]

---

89. *Id.* at art. 3(3)(c).

90. *Id.* at art. 3(3)(i).

91. *Id.* at art. 3(2)(i)-(ii).

92. MIF II, *supra* note 29, at art. 3(2).

93. *See id.* at art. 3(a)-(i).

94. *See id.* at art. 3(3)(i).

95. *Id.* at art. 3(3)(b) ("Grants may be made available on a basis which permits contingent recovery in appropriate cases of funds disbursed"); *see also* MIF II, supra note 29, at art. 3(3)(f) ("The Fund shall continue its practice of sharing the cost of operations with executing agencies, encouraging appropriate counterpart funding and adhering to the principle of not crowding out private sector activities").

96. MIF II, *supra* note 29, at art. 4(5)

> [t]he Donors Committee shall request an independent evaluation by the Bank's Office of Evaluation and Oversight, payable with resources of the Fund, to review Fund results in light of the purpose and functions of this MIF II Agreement; this

Second, the financing should be developmental in character.[97] This requires the Fund to ascertain the social and economic effects of each financing and to deny support to activities which do not "contribute to the development of the host country."[98] Third, the activity must comply with existing international norms and standards.[99] Although the requirement under Article III, section 3, subsection g concerning the host country's prior approval, non-objection to the financing of the project, may serve the purpose of this third condition, it is clearly not sufficient per se to guarantee the compliance of the activity sponsored with the host country's internal laws and regulations. Therefore the Fund must verify that this condition is satisfied and can best do so by demanding a confirmation from the host government to that effect at the time the government issues its approval (non-objection) of the financed operation. Fourth, in order for an activity to be financed it must be consistent not only with the "Fund's purpose" but also with the declared development priorities and aims of the host country, though this is not explicitly mentioned in the MIF Agreement.[100] This condition can best be met through a statement to that effect from the host country. All these requirements are aimed at serving the dual purpose of stressing the developmental character of the MIF's financing operations and of minimizing the occurrence of losses to the financing recipients and eventually to the MIF. Indeed, contentious action by host countries has on several occasions been associated with inconsistencies between the financing, whether it is in the form of grant, loan or guarantee, and the host country's developmental aims or legal requirements.

Introducing alternative means by which the Fund is to serve its broad purpose Article III, section 2 of the MIF Agreement also provides that the MIF, in addition to its financing operations, may supply advisory services in

---

> evaluation shall continue to include an assessment of the results of project groups, based on benchmarks and indicators, for aspects such as relevance, effectiveness, efficiency, innovation, sustainability and additionality, and progress with regard to the implementation of recommendations approved by the Donors Committee.

97. MIF II, *supra* note 29, at art. 4(2).

98. *Id.*

> The Donors Committee shall consider operations that follow such functions (i.e. maximize the Fund's comparative advantage through operations with high developmental benefits, efficiency, innovation, and impact in accordance with the functions of the Fund as specified in Article I, Section 2) and decline to consider, or phase out, those that do not . . .

99. *Id.* at art. 3(2)(a)(i).

100. *See* MIF II, *supra* note 29, at art. 2(2)(a).

the sphere of development.[101] Like financing operations, advisory services "may be provided to governments, government agencies, sub-national entities, non-governmental organizations, private sector entities, or others."[102] However, as the MIF shall "complement the work of the Bank, the IIC and other multilateral development banks," advisory services can also be supplied for the benefit of the IDB or any other financial institutions belonging to the Inter-American Development Bank group.[103] That said, neither Article III, section 2 nor other provisions in the MIF Agreement clarify the meaning and scope of these 'advisory services, ' which are only mentioned as a tool available to the Fund. Nevertheless, the Fund aims to maximise developmental impact in the Latin American and Caribbean region, not only in terms of lending volume, but also through technical assistance that is not directly linked to lending. Therefore technical support services certainly fall within the term of 'advisory services' as indicated in Article III, section 2 of the MIF Agreement. If that is correct, this implies that the Fund, again through its Donors Committee, may technically support policy reforms, programs of good governance, programs dealing with subregional economic cooperation or environmental protection and natural resources management in the regional developing member countries of the Bank and the developing member countries of the CDB.[104]

V. FINAL REMARKS

It is clear from the foregoing that the MIF's continuityand success will depend in particular on the good relations it builds with donor countries and their representatives at the Donors Committee.[105] It will have every inducement to prevent disputes with these countries whenever possible.[106] From the very beginning when it was still governed by the MIF I Agreement

---

101. *Id.* at art. 3(2)(a).

102. *Id.*

103. MIF II, *supra* note 29, at the PMBL.

104. *See* MIF II, *supra* note 29, at art. 3(3)(i) ("The Donors Committee may approve partnering with local entities for project preparation and execution . . . ").

105. MIF II, *supra* note 29, at art. 4(2) (Incidentally it is worth recalling that "The MIF II Agreement shall remain in force until December 31, 2015, and may be renewed for no more than one additional period of up to five years"). *See also Donors*, MULTILATERAL INVESTMENT FUND MEMBERS OF THE IDB GROUP, http://www.fomin.org/en-us/HOME/About-MIF/Donors (The Fund currently has 39 donating member countries from Latin America and the Caribbean, North America, Europe and Asia. China is the newest member, joining in January 2009) (last visited Oct. 12, 2014).

106. MIF II, *supra* note 29, at art. 4(4)(a) ("The Donors Committee shall attempt to reach decisions by consensus. In cases where a decision cannot be reached by consensus after reasonable efforts, and unless otherwise specified in this MIF II Agreement, the Donors Committee shall reach decisions by a three-quarters majority of the total voting power").

the MIF pursued the establishment of "a synergism of cooperation" between developed and developing countries (alias donor countries and grant recipient countries) within the Latin American and Caribbean region.[107] MIF's investment projects, much as the debates that led to the final text of its establishing Agreement in 1993, would be generally founded on the broad consensus of both groups of countries. As every dispute with a member country might undermine this consensus, it is to be expected that the MIF through its Managing Body (the Donors Committee) will attempt to avoid disagreement.[108] Furthermore, the constraints of the MIF's business will naturally force it to provide financing in the form of grants, loans, guarantees or any combination thereof with a constant view to the prevention of claims.

The origins of a dispute between donor countries and grant (loan or guarantee) recipient countries can often be traced to the lack of clear and self-executing legal standards applicable to the treatment of financing operations and advisory services. If the conditions and terms of the financing lack the flexibility to be easily adjusted to ever-changing circumstances, a host country could later feel tempted to remedy the arrangement by a unilateral measure such as, in extreme circumstances, its withdrawal from the Fund.[109] Also, if an activity sponsored by the MIF runs into difficulties, a host country could interfere in order to defend its interests or those of its private operators and companies.[110] Additionally, the lack of applicable legal standards or the application of unclear provisions often leads to the inception or exasperation of controversies. The MIF will, thus, meticulously evaluate every single prospective project and activity to be funded to make sure it is economically feasible and sound to make sure of the following: it is consistent with the development statutory aim of the Fund as well as with the host country's laws and development purposes, and will effectively enhance the development of the host country. It will deny support when it finds failings in the prospective project or activity. Moreover, the MIF is mandated to enter into agreements with member countries on the standards applicable to the financing operations and advisory services it supplies. Indeed the MIF Agreement prohibits the MIF from starting financing operations in a country unless it is

107. *Id.* at the PMBL., art. 6(5) (The MIF I Agreement was renewed until December 31, 2007 pursuant to Article V, Section 2 thereof. From March 2007, it was replaced by the Agreement Establishing MIF II, signed in Okinawa, Japan on the 9th day of April, 2005).

108. *See id.* at art. 4(4)(a) ("The Donors Committee shall attempt to reach decisions by consensus" provides that "In cases where a decision cannot be reached by consensus after reasonable efforts, and unless otherwise specified in this MIF II Agreement, the Donors Committee shall reach decisions by a three-quarters majority of the total voting power").

109. *How we work*, *supra* note 69 ("The MIF's flexibility to use both grant and financing instruments to support its projects has made it an exceptional partner for achieving developmental impact through innovative solutions").

110. MIF II, *supra* note 29, at art. 4(4)(a), 5(4)(a).

satisfied that legal protection for the financed activity is effectively available.[111] Lastly, perhaps the strongest anti-dispute mechanism is the MIF Agreement's requirement of host government non-objection for the issuance of the MIF's financing or advisory service.

111. *See* MIF II, *supra* note 29, at art. 3(3)(a),(c).